DOCUMENT RESUME

ED 088 842 SP 007 813

AUTHOR Marsh, John J.
TITLE Teacher/Counselor Certification and the Felony Conviction: A Survey of Selected Practices.
PUB DATE Jan 73
NOTE 17p.

EDRS PRICE MF-$0.75 HC-$1.50
DESCRIPTORS Board of Education Policy; *Criminals; National Surveys; *Prisoners; State Laws; Surveys; *Teacher Certification; *Teacher Employment; *Teachers
IDENTIFIERS Felony Convictions

ABSTRACT

Working with the paradox that prison is a place where an inmate frequently is trained to do what he will subsequently be prohibited from doing, this document presents the results of a survey of each of the fifty states regarding the certification as a teacher and/or counselor of a person convicted of a felony. Answers to each question in the questionnaire sent to state certification officers are described. There follows a discussion of these results and an outline of the minimal essential considerations of those states that have developed policies. Among these considerations are a) the right of a hearing; b) an appeal process; c) specificity of the descriptors of disqualification; d) clear and consistently defined use of terms; and e) the rights of the individual to pursue his profession balanced against the rights of society to insure that unfit persons are not allowed to teach or counsel in the public schools. It is concluded that educators, individually and collectively, have made little effort to develop a coherent, rational, and fully implemented policy and procedure relevant to felony convictions and certification, and that much more research is needed. (JA)

ED 088842

421

TEACHER/COUNSELOR CERTIFICATION AND THE FELONY CONVICTION

A Survey of Selected Practices

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

JOHN J. MARSH, PhD
Research Specialist
Correctional Education Association

SP 007 813

January, 1973
Santa Fe, NM

TEACHER/COUNSELOR CERTIFICATION AND THE FELONY CONVICTION

A Survey of Selected Practices

Introduction

In December of 1971, Chief Justice Warren Burger stated at the first National Conference on Corrections that the inmate should "learn his way out of prison."[1] The unfortunate paradox of this recommendation is that, in all too many instances, he will have learned to do what he is subsequently prohibited from doing.

While much research remains to be done in the area of employment barriers for the ex-convict, the gravity of the problem is already well established:

> "The right to work has been acclaimed 'the most precious liberty that man possesses.' For the ex-convict, however, the right to work in an occupation of his choice is at best a qualified right and in many instances is non-existent. A job applicant with a criminal record may face substantial prejudice on the part of many prospective employers. In addition, the ex-convict is confronted with a vast array of federal, state, and local regulations labeling him unsuitable for public employment and a host of licensed occupations."[2]

The Vanderbilt Law Review quoted above goes on to point out that a license to engage in some types of employment may be refused or revoked even if a person has been acquitted of criminal charges. The research reported in that journal also brings out the fact that a pardon or expungement of penalties and disabilities resulting from a conviction do not always work to prevent denial or revocation of a license to engage in a profession or controlled employment. In addition to statutes that prohibit employment licensure to persons convicted of serious crimes or of specific offenses, legislatures have frequently added the requirement of "good character" or

"moral behavior." That the employment has little or no relationship to the nature of the offense is of no consequence. A felony conviction is a bar to selling hearing aids in Michigan, being a forester in Oklahoma, operating a dry cleaning plant in California, or being a water-well contractor in North Carolina.[3]

These restrictions and barriers to employment and consequently to rehabilitation have recently caused concern and action from various sources. The Correctional Association of New York formally recommended to the 1971 session of the State Legislature that restrictions in that state be lifted for the most part.[4] The American Bar Association, with the support of the United States Supreme Court and the Judiciary Committee of the United States Senate, recently established a Commission on Correctional Facilities and Services. One of its primary goals is to remove restrictions on the employment of rehabilitated prisoners including the right to hold public office.[5] On July 23, 1971, Richard B. Ogilvie, Governor of Illinois, signed thirty-one pieces of legislation that removed arbitrary licensing and registration restrictions that had barred felons from a variety of pursuits including dealing in livestock.[6] It may be speculated that the prohibition against dealing in livestock is an excellent example of the archaic and atavistic origin of many of the employment restrictions for the ex-convict. Certainly no lower form of life existed on the frontier of the past century than the horse thief and the rustler; often he was hung without benefit of trial. The crime may no longer be with us, but the retributive thinking it engendered is still rampant.

The efforts of the American Bar Association are focused in the National Clearing House for Offender Employment Restrictions located in Washington, DC. They have produced an excellent document as a guide to legislators and others to remove these restrictions.[7] This agency, however, has so far concentrated

on the legislative barriers rather than the discretionary administrative and professional ones. This observation is not criticism but is a recognition of priorities.

Licensing agencies "may" revoke or deny on the basis of such vague and undefinable factors as lack of "moral character," evidence of "moral turpitude," or conviction of a "serious crime." There is a need for research beyond the statutes and the judicial opinions and into the area of policy and practice -- attitude and belief -- procedure and process.

The author, during his experiences in a correctional setting as an educator, reached several conclusions that are relative to and prompted this study. The first is that many inmates, correctional staff, and private citizens believe that the man in prison has lost his citizenship. They further believe that this loss of citizenship is the basis for all of the other "losses" that the inmate endures during and after confinement. The second conclusion is that many inmates are capable of success in higher education, want it, and will avail themselves of it if available. Of those who do, a significant number want to work in the "helping professions," including teaching and counseling. To the degree that their experiences give them an insight into the problems of youth, they may have an advantage over others.

In the process of counseling and working with inmates in a college program inside the penitentiary, the author frequently had to deal with the question of the certification of the ex-convict. Failing to find a clear answer, the decision was reached to conduct a survey of selected policies and practices in each of the fifty states regarding the certification as a teacher and/or counselor of the person convicted of a felony.

Procedure

In May of 1972 a questionnaire was designed and a copy was submitted to the National Education Association together with a draft of the cover letter to be used. The NEA was asked to comment on the proposed research and to authorize the inclusion of a statement in the cover letter indicating their support of the project. The Division of Instruction and Professional Development of the NEA authorized the inclusion of a statement of "advocacy" in the cover letter. On July 29, 1972, the cover letter and seven-item questionnaire were sent to each of the fifty state certification officers. The District of Columbia and the United States territories and possessions were excluded due to their special status relative to federal and local legislation. On August 23, a follow-up letter was sent to the fourteen non-respondents of whom thirteen finally responded. While the response rate of 98 percent (49 out of 50) is excellent for most research, in this instance there is no reason why even one state should have failed to respond.

Survey Results

Item 1, Name of State.

This item was for control purposes. There is no characteristic of the non-responding state to which the author can attribute the failure to respond.

Item 2, We will grant a teaching and/or counseling certificate to a person who has been convicted of a felony. Yes __ No __ Under Some Conditions __.

Nine states responded No, seven Yes, and thirty-three checked the Under Some Conditions response. Three states included in the thirty-three gave a multiple response including a Yes or a No, in addition to Under Some Conditions. Their position was resolved in favor of the latter response.

Item 3, We will revoke the certification of an already certified person who is convicted of a felony. Yes __ No __ Under Some Conditions __.

Fourteen states answered Yes, two gave a No response, and the remainder were Under Some Conditions responses. As with the previous item, there were some states that gave multiple responses that were interpreted as Under Some Conditions. One of the states responding No to this item responded Yes to Item two, and the other responded Under Some Conditions to that item.

Item 4, Persons sentenced to a penitentiary have lost their citizenship. Yes __ No __.

Thirty-five states responded No to this item, eleven said Yes, and eleven did not respond. Two gave a narrative response that could not be classified. Of the eleven states that said Yes, two characteristics were evident in six of them. They were either primarily non-urban and/or were in that section of the country where "states rights" plays a major role in political philosophy. The large number of non-respondents was not unexpected since this item appeared somewhat unrelated to the subject matter as well as the job knowledge of the respondents. The inclusion of this item, in connection with the following one, was an effort to determine the degree which this belief figured into the basic question of teacher/counselor certification policy.

Item 5, Our answer to questions 2 and 3 are controlled by (circle as many as apply):

A. State Law

B. Administrative rules

C. Our answer to question #4, above

Twenty-four states indicated State Law controlled, twenty-six circled Administrative rules, and two indicated that the citizenship response was controlling. Twelve states chose two or more responses. Ten states either did not respond or made narrative comments that are unclassifiable on the basis of the three choices offered.

Item 6, Our application forms for certification contain a question designed to reveal the existence of a criminal record. Yes __ No __.

Twenty-five respondents indicated their application is designed to reveal the existence of a criminal record, and twenty-four responded negatively. Eighteen of the states who indicated they would not certify the felon or would certify him only under certain conditions do not have a question on their certification forms designed to reveal the existence of that felony. There was no discernible pattern of geography, political structure or other pertinent characteristic to identify those states seeking this information on their application forms from those that do not.

Item 7, Use the space below for any comments you have related to the subject matter of this research. If you have a written policy in this area, we would appreciate a copy of it or a synopsis below in addition to comments. We would particularly appreciate a discussion of the "under some conditions" answer to questions #3 and/or #4 if you checked that response. Of particular importance will be whether the nature of the sentence is the controlling factor.

Thirty-one states gave some response to this item, varying from a short sentence to the inclusion of application forms and extracts of regulations, state laws, etc. Two states indicated that they had no written policy on the subject. Of the thirty-one states giving some specific additional information in response to Item 7, the following points made and frequencies appeared to be pertinent: (a) Fifteen states used terms such as "good moral character," "moral turpitude," "serious crimes," etc., to describe a disqualification of the applicant for certification, but did not clarify or give examples for those terms. (b) Two states listed specific crimes or offenses which were disqualifying. (c) Four states indicated that, in some

instances, disqualification was automatic without a hearing or any exercise of discretion on the part of the certification official. In most of these cases, the automatic provision was tied to specific offenses and/or to offenses within a specified period of time preceding the application for certification. (d) Fifteen states placed the responsibility for certification in the hands of the State Board of Education and made the matter discretionary except for those few states which prohibited certification for certain specific offenses. (e) Seven states spelled out or referred to a procedure for initiation of certification revocation proceedings, and eleven reported a procedure for appealing a denial or revocation of certification.

Discussion

There is some question as to the validity of the responses for Item 2. One state responding with a No position included a manual of regulations for certification that used the terminology "may refuse to certify an applicant convicted of a crime involving moral turpitude." The use of the discretionary "may" in conjunction with the term "moral turpitude" suggests that this state would certify the applicant with a felony conviction under some circumstances. Another state responding No to Item 2 included in their response to Item 7 that state law required that only persons of "good moral character" be certified. This also suggests that the ex-felon may sometimes be eligible for certification.

The response pattern for Item 3, like that for Item 2, indicates that the majority of jurisdictions view the presence of a felony conviction as somewhat incompatible with the position of trust and responsibility inherent in certification to teach and/or counsel. As with responses to Item 2, there is some basis for questioning the results of this survey.

More than one state that selected the Yes rather than the Under Some Conditions response included information in response to Item 7 that revocation was a discretionary action on the part of the State Board of Education and required consideration of the merits of the case as well as indicating that the decision to revoke could be appealed.

Item 4 on citizenship did not present the anticipated results. During preliminary discussions regarding this research with inmates, correctional educators, correctional staff, and teacher certification personnel, the"off-hand" comment that the prisoner has lost his citizenship came up quite often. This statement also appears in print in publications about corrections.[9] The error of this is that citizenship status exists as spelled out in the U. S. Constitution; neither Congress nor the states were granted the power to denationalize persons, and the Supreme Court has declared unconstitutional every action of denationalization brought before it. There is a fundamental distinction between the status and the privileges of citizenship, however, and one should not be confused with the other. The citizen convicted of a felony is still a citizen even though denied certain privileges such as voting, etc.[10]

Two states presented unusual response positions on Item 5. One state indicated that none of the responses applied, while another added the comment that they had no legislation covering certification. The responses to Items 4 and 5 suggest that, while there is some belief that prison inmates have "lost" their citizenship, this "loss" is not pertinent to the decision to grant, deny, or revoke certification.

The large number of states (24) that indicated that they do not have a provision in their application forms to reveal a felony conviction invites several observations. One of these, supported by comments added to the questionnaire in some instances, is that this information is expected to

arise from other sources. Some states commented that they expect this information to come from a question on the form regarding revocation or denial of certification by some other state. Others expect the information to arise from the requirement that the teacher training institution "vouch" for the character of their graduate. Some expect to develop this information from references from the prior employer. One state even indicated that the disqualifying record of a felony conviction will arise after certification in the process of applying for employment in a school district. This "ex-post facto" process is of doubtful legality, is subject to question as to its professional propriety, and is certainly of marginal certainty and efficiency as a method of controlling certification of the felon. Another observation is that the felony conviction is so infrequent a matter that adequate provision has not been made for it in the application forms. An even more likely explanation may lie in part in the failure of forms and systems analysis processes to be applied to the certification procedure.

The open-endedness of Item 7 produces some of the best insight into the subject. Certain types of behavior, including criminal activity, appear to be a fairly common basis for denial and revocation of certification. The decision as to what constitutes unacceptable behavior, particularly in terms of felony convictions, is largely undefined. The authority to grant, deny, or revoke certification is usually left to the educational system. Procedural "due-process" in revocation and denial and appeal procedures is minimal in content and infrequent. While representative of single states only, the following statements extracted from the responses to Item 7 and/or the legislation - regulations - procedural pamphlets appended to the questionnaire are of interest and show some specific approaches to the certification of the felon.

One southwestern state uses the guideline that the decision

to certify "will be based upon the safety, moral and educational welfare of the child, balanced against the right of the individual to practice his profession." This was the only reference to the idea of the "right to work" in all of the responses to the survey. This state also places the onus of reporting an arrest and conviction upon the already certified person and declares failure to report this fact as prima facie evidence of intent to conceal the conviction. This failure may then be the basis for the revocation rather than the conviction itself.

A western state, one that identified specific offenses as disqualifying and also requires mandatory denial/revocation of certification in certain instances, also indicated that an arrest NOT resulting in a conviction (acquittal, dropping or dismissing charges, etc.) may be the basis of certification denial or revocation. This statement was made by the legal counsel for the certification authority.

An eastern state listed "current membership in the communist party" as "conclusive evidence" of professional unfitness to teach. The United States Supreme Court has ruled that membership in the communist party is not illegal per se. One may speculate as to the outcome of legal action challenging the rule of this state based upon the freedom of association and due process provisions of the Constitution.

A mid-western state responded that "there is no written policy except that the Teacher Training and Licensing Commission must review applications where a felony conviction is involved."

Another mid-western state provides that revocation of certificates is a prerogative of the county superintendent of schools.

An Atlantic seaboard state indicated that they had no statute dealing with certification of felons and that the matter would be treated as a "personnel problem."

A Great Lakes state indicated that they had no written policies on the subject of certification of the felon. They also indicated that they were considering a certification rule that would bar the person who was convicted of contributing to the delinquency of a minor or a felony related to teaching.

The responses reported and discussed above should not be interpreted to indicate that non-respondents to Item 7 do not have procedures, statutes, and policies that are applicable to the certification of the felon. The failure of eighteen states to give any response to Item 7 is susceptible of several speculative interpretations. The most likely one is that the person completing the survey instrument did not see any purpose to or did not have the time to deal with the last item. This is a disadvantage to an open-ended invitation to supply general information in surveys.

Conclusions and Recommendations

It is difficult and possibly premature to generalize from this research that raises so many more questions than it answers. However, several conclusions appear from the responses to this survey that are viable and are partially supported by other research.

With a few exceptions, the authority to certify is placed by the legislatures in the hands of a "board of education." In being placed there, little guidance is given beyond the requirement that the person be of "good moral character." Where legislation is vague or results in arbitrary and unreasonable restrictions on employment, the courts have struck down those standards on due process grounds and set a standard of its own.[11]

There are few certification agencies which have developed policy that adequately provides for the following minimal essentials regarding certification and the felony conviction:

a. The rights of the individual to pursue his profession must be balanced against the rights of society to insure that unfit persons are not allowed to teach or counsel in the public schools.

b. There must be enough specificity to the descriptors of disqualification that the certifying agency and the applicant can reasonably be expected to agree as to their meaning and so that the appropriate evidentiary information on both sides can be developed in order to reach a sustainable decision. Lately the courts are scrutinizing the character standards used in licensure to insure that there is a rational connection between past conduct and present fitness.[12] It may be argued that "good moral character" will ultimately pose the same problem to the courts that they are already facing with "obscenity." In dealing with human rights and the legal processes in our society, neither of these terms, both of which deal with morality, appear to be adequate to protect the rights of either society or the individual.

c. There must be procedure for a hearing with the rudiments of due process afforded to the applicant. A guide in this respect may well be the decision in Dixon v. Alabama State Board of Education, regarding due process in student discipline.[13] This case is the foundation for due process in education for students, particularly in expulsion cases. What better standard than this for "expulsion" of the teacher or counselor?

d. There must be an appeal process, preferably to a person or agency other than the one which made the original decision, with the procedural requirements spelled out.

e. There must be a reasonable relationship between the offense and its pertinent factors and the basis for denial or revocation.[14] The offense of child abuse or trafficing in drugs bears an entirely different relationship to being an educator than does a conviction for draft evasion.

f. There must be a clear and consistently defined use of such terms as felony, arrest, conviction, misdemeanor, etc., to make it clear exactly what is pertinent. Some application forms speak of "felonies other than minor traffic violations." Minor traffic violations are not felonies. This poor wording makes it clear that the distinction between a felony and a misdemeanor is not clearly understood by certification personnel any more than it is by the average layman.

There must be a fully descriptive publication of the policy and procedure for the guidance of the applicant, as well as school officials, certification personnel and other interested parties.[15] The absence of complete and definitive policy and procedure revealed in the majority of cases by this survey is serious. It can be the basis for an adverse ruling in a court action.[16] The lack of procedures and policy leads to the development of extemporaneous rules for each situation. This extemporaniety is often inconsistent, may generate illegal actions, is difficult if not impossible to document and subsequently review, and often leads to the assumption of authority by unauthorized persons. Neither nature nor bureaucracy can tolerate a vacuum. Worse of all, the lack of rules or policy may often lead to actions which may be interpreted by the public as unjust, unfair, or even illegal. In effect, public trust and confidence is damaged.

The administrative procedures relative to the certification process are clearly lacking in completeness as well as effectiveness. There seems to be little procedure for review and revocation if there is a felony conviction after certification. Of particular interest is the procedure to revoke when the individual is not employed as a teacher or counselor at the time of the felony conviction. There appears to be little recognition of the fact that inquiry into criminal records in the college admissions process is a rarity. What of the student who is convicted of a felony while a student and the college is not aware of it? Such is easily possible in a number of different situations. Depending upon the teacher training institution to produce a record of unfitness due to felony conviction as a part of their "recommendation" is marginal in accuracy. The expression of concern about an issue, certification and the felony conviction, followed by haphazard and incomplete policy and procedure is a puzzlement. The suspicion is generated that the situation may be deliberate because the entire issue is viewed as too controversial.

The single, most evident, conclusion is that educators, individually and collectively, have made little effort to develop a coherent, rational, and fully implemented policy and procedure relative to felony convictions and certification.

Much more research is needed in this area. It was not anticipated that there would be as much ambiguity developed when this study was initiated. It would appear that the certification agency is not the best source of information and that the state board itself should be surveyed. Likewise, there needs to be a study of the roles and functions of teacher training institutions, local education officials, and the professional associations in the question of certification and felony conviction.

Several significant social developments of the past decade merit mention in closing. The due process provisions of the Constitution are being applied in increasing frequency to matters outside of the criminal--to education, civil rights, employment, etc. The autonomous nature of governmental bureaucracy is under increasingly successful attack as the idea of the ombudsman, Naderism, and "Common Cause" grow in influence. The entire structure of corrections is being looked at, including the idea that the collateral effects of imprisonment are unjust and must be terminated if the system is to correct and not just punish. Crime--its causes, its treatments, and its costs in human and economic terms--has become one of our most pressing domestic concerns.

Education is committed to the concept of human growth and development--change. Educators must apply to their own personnel policies the same commitment to the concept of human change that is the very basis of education itself. Education must take the lead in society's safari to discover the source of criminality and rehabilitation. Certification policies and procedures must be developed that are consistent with the commitment that the individual must change, the belief that the individual will change, the evidence that the individual does change. The cliche, "once a criminal, always a criminal," must be rejected by the thoughts, words, and deeds of each and every person in the profession of education.

BIBLIOGRAPHY

1. Warren Burger. Address to National Conference on Corrections. Williamsburg, Va., December 7, 1971.

2. The Collateral Consequences of a Criminal Conviction. Vanderbilt Law Review, 23:5 (October, 1970), p. 1001.

3. Ibid., pp. 1007-1009.

4. Recommendations to the 1971 Legislature. New York: The Correctional Association of New York (undated)(mimeographed).

5. Richard J. Hughes. Statement Before Sub-Committee on National Penitentiaries, Judiciary Committee of the U. S. Senate, May 20, 1971.

6. Menard Time, August 1, 1971.

7. Removing Offender Employment Restrictions. Washington: National Clearinghouse on Offender Employment Restrictions, American Bar Association, 1972.

8. Government Job Opportunities for Ex-Offenders. Washington: National Clearinghouse on Offender Employment Restrictions, American Bar Association, 1972.

9. Justice and the Imprisoned. Philadelphia: The United Presbyterian Church USA, 1972, p. 25.

10. Vanderbilt Law Review, pp. 966-969.

11. Removing Offender Employment Restrictions, p. 7.

12. Ibid., p. 9.

13. Dixon v. Alabama State Board of Education, 186 F. Supp. 945 (M.D. Ala. 1960), 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

14. Removing Offender Employment Restrictions, p. 14.

15. Occupational Licensing and the Supply of Non-Professional Manpower. Washington: Manpower Administration, U.S. Dept. of Labor, 1969, p. 11.

16. Offender Employment Review. Washington: National Clearinghouse on Offender Employment Restrictions, December, 1972.